Police Prosecutor Update

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A very interesting recent Court of Appeals case provides the opportunity to review the "frisk" prong of the law of stop and frisk.

In the early morning hours, a deputy sheriff responded to a report of a burglary in process. A witness reported seeing two white males, one of whom was wearing dark clothing and a baseball cap, going in and out of a garage window, but "they were scared off by a neighbor who put their porch light on." The deputy began to patrol the area looking for the suspects. He saw two white males, one of whom was the defendant, walking along the street. Both were wearing dark clothes, and one was wearing a baseball cap. The deputy turned his vehicle around to investigate whether they were involved in the burglary, and they turned around and began walking in the opposite direction. As the deputy pulled alongside them, a female joined the two males. He asked them to stop. The deputy, who testified that he was concerned about his safety, asked them to put their hands on his car so he could pat them down for weapons. As he was patting down the defendant, the defendant said he had a pellet gun in his waistband. As the deputy was removing the pellet gun, the defendant put his hand in his pants pocket. Concerned that he was reaching for a knife, the deputy grabbed his hand to remove what was in it and discovered a bag of marijuana. The defendant sought to suppress the marijuana because the deputy was not justified in conducting the patdown.

In an investigatory stop, if the officer has a reasonable fear of danger, he may conduct a patdown of the suspect's outer clothing for weapons. An officer's authority to conduct a patdown search is dependent on the nature and extent of his *particularized* concern for his safety. An individual stopped may not be frisked for weapons unless the officer has a reasonable belief that the particular person is armed and dangerous, although the officer needn't be absolutely certain.

In this case, the deputy testified that he patted down the defendant because he was concerned for his safety. However, *generalized concerns* of officer safety will not support a lawful frisk. In the case of a self-protective search for weapons, the officer must be able to point to *particular facts* from which he reasonably inferred that the person was armed and dangerous.

The prosecution argued that the mere fact that the deputy suspected the defendant of having committed a burglary was "an independent basis to sustain the weapons frisk." The Court of Appeals reviewed the law from other states. It agreed with the decision of the New Mexico Court of Appeals that "the right to frisk is automatic whenever the suspect has been stopped on the suspicion that he has committed, was committing, or was about to commit a type of crime for which the suspect would likely be armed." The New Mexico court stated that burglary is a crime of the type for which a suspect would likely be armed and concluded that an officer who stops a suspect on reasonable suspicion of such an offense may conduct a protective search. Our Court of Appeals also agreed with the New Mexico Supreme Court that the "right to frisk is automatic when a suspect has been stopped on the suspicion of committing or preparing to commit an inherently dangerous crime, such as burglary."

Our Court of Appeals concluded that, "Given the inherent danger associated with burglary, it was reasonable that the deputy may have feared that these burglary suspects might pose a danger to him or others." The Court cited Indiana cases that supported its conclusion and acknowledged other cases that did not support it. It will be interesting to see if this case makes it to the Indiana Supreme Court.

Case: *N.W. v.State*, ___ N.E.2d ___ (Ind. Ct. App. 2005).